

	<b>Department of Administration</b>	<b>Number: FY01-05</b>
	<b>Policy – External</b>  <b>Risk Management &amp; Tort Defense Division</b>	<b>Effective Date: 8/98</b>
	<b>Subject: Contractual Transfer – Hold Harmless and Indemnity Provisions in Contracts.</b>  <b>This policy may be found in its entirety in the Risk Management Program Manual, Section XIV.</b>	<b>Approval: Final</b>

### CONTRACTUAL TRANSFER

This policy is effective for new contracts beginning July 1, 1992. For existing contracts, the policy is effective upon contract renewal.

In its contractual relationships with independent contractors, the State of Montana will transfer liability for services performed under contract to the contractor.

- a. The comprehensive insurance plan is intended to provide insurance for the State of Montana and its employees and not vendors, independent contractors, or other third parties. (Independent contractors, vendors, and third parties shall procure their own insurance).

Only in **exceptional circumstances**, and under **prior written agreement** with the Risk Management and Tort Defense Division, will the division defend and indemnify third parties or independent contractors.

- b. All of the following criteria shall be met before an exception is granted:
  - 1) The service proposed under contract must fulfill or further state purposes and interests and be funded and/or supported by the participant.
  - 2) The proposed service to be provided under contract is unique and difficult to obtain in the absence of state indemnification.
  - 3) The independent contractor is unable to obtain insurance (for reasons other than a poor loss record and/or insurance is cost prohibitive and generally not available for the type of risk exposure proposed under contract).

Participants requesting an exception shall set forth in writing the reasons why the state should insure the independent contractor based on the above criteria. Written approval must be granted by the Risk Management and Tort Defense Division prior to the loss.

- c. Participants entering into contracts with third parties shall require the contractor to "hold the state harmless" and to **DEFEND** and **INDEMNIFY** the state for any and all causes of action arising from the contractor's negligent execution of the contract.
- d. Participants shall require independent contractors to carry comprehensive general liability insurance coverage (including automobile liability insurance where applicable).

Participants which are a party to the contract shall require and maintain proof of independent contractor insurance.

- e. Participants shall require the contractor to carry insurance commensurate with the risk assumed in performance of the contract. This will potentially reduce the state's liability if the contractor, and subsequently the state, is named in a tort action.

For example, a participant should require a construction contractor to carry higher limits of liability insurance than a clerical support contractor because the work performed is inherently riskier to the State of Montana if the contractor is negligent.

- f. Participants shall, where feasible, request the independent contractor to name the participant of the state as an "additional insured". "Additional insured" status is typically granted by the independent contractor's insurer by endorsing the contractor's insurance policy and gives the state added immunity and protection should the contractor or its insurer become insolvent.

Participants shall assure that independent contractor's insurance is primary to the exposures insured under the state contract and not excess to the state's insurance.

Participants with questions about contractor insurance should contact the Risk Management and Tort Defense Division or refer to the Contracts Manual for additional guidelines.

- g. In accordance with § 18-4-312, MCA, participants shall require the contractor to provide a contract performance surety bond, with a licensed surety, for contracts in excess of \$10,000.

FOR MORE SPECIFIC INFORMATION ABOUT HOLD HARMLESS AND INDEMNITY PROVISIONS IN CONTRACTS, PLEASE SEE THE DIVISION'S CONTRACTS MANUAL ENTITLED 'HOLD HARMLESS AND INDEMNITY PROVISIONS IN CONTRACTS'.

